

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JACK FRIEDMAN AND ESTHER FRIEDMAN	:	DETERMINATION
	:	DTA NO. 818267
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law and New York City Personal Income Tax under	:	
Chapter 46, Title T of the Administrative Code of the	:	
City of New York for the Year 1982.	:	

Petitioners, Jack Friedman and Esther Friedman, 129 Audley Street, Kew Gardens, New York 11418, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1982.

On August 17, 2001, petitioners and the Division of Taxation consented to have the controversy determined on submission without a small claims hearing. The Division of Taxation submitted documents and a letter brief. Petitioners' reply brief was filed by the December 14, 2001 due date, and it is this last brief date that commences the three-month period for the issuance of this determination. Petitioners appeared by Groman, Ross & Tisman, P.C. (Robert H. Groman and Barry C. Feldman, Esqs., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

After reviewing the documents and briefs, James Hoefer, Presiding Officer, renders the following determination.

ISSUES

I. Whether petitioners are entitled to interest on the \$16,093.00 overpayment in tax due them for the 1982 tax year for any period after February 4, 1986, said date representing the 90th day after the final Federal determination granting a Federal overpayment, or whether such interest is precluded by the provisions of Tax Law former § 687(c).

II. If petitioners are not entitled to any additional interest on the \$16,093.00 overpayment for the 1982 tax year, whether they are entitled to a refund of interest charges paid on a deficiency for the 1979 tax year for any period after March 5, 1986 due to the Division of Taxation's failure to apply the 1982 overpayment against the tax due for 1979.

III. If petitioners do not prevail on either of the above two issues, whether they nonetheless are still entitled to interest on the 1982 overpayment for any period after February 4, 1986 based on the principles of fairness and equity and also based on the ground that a denial of additional interest to petitioners would result in the unjust enrichment of the Division of Taxation.

FINDINGS OF FACT

On September 7, 2001 and September 12, 2001 the Division of Taxation ("Division") and petitioners, respectively, entered into a Stipulation of Facts. In their opening brief, petitioners also submitted proposed Findings of Fact 1 through 26 and in its answering brief the Division has indicated that it "generally agrees with the Facts proposed by petitioners" in said opening brief. Furthermore, this proceeding has its genesis in a determination issued on February 10, 2000 in the ***Matter of Jack Friedman and Esther Friedman*** under DTA # 816562. The stipulated facts, proposed facts and the facts found in the earlier determination are all incorporated by reference in this determination and these facts are summarized below:

1. On February 10, 2000, this Presiding Officer issued a determination in the ***Matter of Jack Friedman and Esther Friedman*** under DTA # 816562 for years 1979 through 1982 (hereinafter referred to as “the prior proceeding”). As relevant to the current dispute, the prior proceeding concluded that petitioners were entitled to a refund of \$16,093.00 for the 1982 tax year and the Division was directed to issue a refund of \$16,093.00 to petitioners “plus such interest as is allowed by statute.”

2. As the result of the determination issued in the prior proceeding, the Division, on May 10, 2000, issued a refund to petitioners for the 1982 tax year in the amount of \$21,124.81, which reflected the overpayment in tax of \$16,093.00 and interest from April 15, 1983 to February 4, 1986 in the amount of \$5,031.81.

3. Petitioners are of the opinion that they are entitled to receive interest on the 1982 overpayment from April 15, 1983, the date they filed their 1982 personal income tax return, to May 10, 2000, the date the refund check was issued, and they so advised the Division pursuant to a letter dated June 13, 2000. The Division denied petitioners’ request for the remainder of the unpaid interest on the grounds that Tax Law former § 687(c) was the exclusive provision for determining interest on a refund resulting from a Federal change and that pursuant to Tax Law former § 687(c) interest in the instant matter was payable only until February 4, 1986, a date which corresponds to the 90th day after the Federal changes which created the refund became final. In the prior proceeding, it was determined that petitioners had filed Form IT-115 for the 1982 tax year reporting the Federal changes and claiming the \$16,093.00 refund on March 5, 1986, a date which is within both the general three-year statute of limitations for refund as set forth in Tax Law § 687(a) and the two-year and ninety-day statute of limitations for Federal changes as stated in Tax Law former § 687(c). Petitioners disagree with the Division’s position

that Tax Law former § 687(c) is the exclusive provision for determining interest on a refund resulting from Federal changes in cases such as this where the claim for refund was timely filed under Tax Law § 687(a) without resort to Tax Law former § 687(c). The parties were unable to resolve the dispute and petitioners thereafter filed a petition with the Division of Tax Appeals.

4. On May 23, 1985, petitioners and the Internal Revenue Service (“IRS”) executed a Closing Agreement On Final Determination Covering Specific Matters, Federal Form 906, resolving a dispute concerning certain deductions claimed on petitioners’ joint Federal income tax returns for the years 1979, 1980 and 1981. On November 4, 1985, the IRS District Director notified petitioners that the Revenue Agent’s examination report, which covered the years 1979 through 1982, had been accepted. The result of the IRS examination for the four years in dispute is summarized as follows:

(a) For 1979, reported taxable income was increased by \$102,133.00, which adjustment produced an additional tax due of \$23,745.90.

(b) For 1980, reported taxable income was increased by \$648.00. Since the 1980 return originally reported a net operating loss, this adjustment produced no additional tax due but did reduce the amount of net operating loss which was available to be carried forward to 1981.

(c) For 1981, reported taxable income was decreased by \$35,918.00. The 1981 return also reported a net operating loss and therefore this adjustment did not result in an overpayment. However, this adjustment did increase the net operating loss available to be carried forward from 1981 to 1982 by \$110,419.00, from \$29,422.00 to \$139,841.00.

(d) For 1982, reported taxable income was decreased by \$110,871.00, thereby producing an overpayment of \$33,219.82.

The net result of the IRS examination for the four years at issue produced an overpayment in tax of \$9,473.92 (\$33,219.82 overpayment for 1982 less \$23,745.90 tax due for 1979).

5. On March 5, 1986, petitioners filed with the Division completed forms IT-115, Report of Federal Changes, wherein their New York State and City personal income tax liability for the years 1979, 1980, 1981 and 1982 was recomputed taking into consideration the results of the IRS audit. The forms IT-115 reported that petitioners owed \$15,649.00 for 1979, had no change in their tax liability for 1980 and 1981 and had an overpayment of \$16,093.00 for 1982.

6. On January 21, 1992, the Division mailed a Notice of Additional Tax Due to petitioners asserting that \$18,328.31 of additional personal income tax was due for 1979 based on the Federal audit changes for said year. The amount due for 1979 was ultimately determined to be \$16,588.00.

7. Under threat of levy petitioners, on December 30, 1993, paid the assessment for 1979 which, with penalty and additional interest, totaled \$59,920.24. Interest on the tax due for 1979 was computed from April 15, 1980, the date the 1979 return was filed, to December 30, 1993, the date the tax was paid.

8. Petitioners thereafter requested that the overpayment for 1982 of \$16,093.00, as claimed on the Form IT-115 filed on March 5, 1986, be returned to them with interest. The Division denied the claim for refund for 1982 in its entirety on the grounds that it had no record of ever receiving the forms IT-115 filed by petitioners on March 5, 1986 and that it first received copies of the forms IT-115 in January 1992, a date which is well past the statute of limitations for refund.

9. In the prior proceeding it was concluded that petitioners had adduced sufficient evidence to establish that they had filed the forms IT-115 for the years 1979, 1980, 1981 and

1982 on March 5, 1986 and that the Division had failed to meet its minimal burden of adducing evidence of nonreceipt. Since the March 5, 1986 date of filing of the forms IT-115 was within the statute of limitations for refund it was determined in the prior proceeding that petitioners were entitled to a refund of \$16,093.00 for 1982, “plus such interest as is allowed by statute.” On the date that petitioners filed Form IT-115 for 1982, i.e., March 5, 1986, the time for filing a claim for refund for said year had not expired under either Tax Law § 687(a), the general three-year period, or Tax Law former § 687(c), the 2-year and 90-day period for Federal changes.

CONCLUSIONS OF LAW

A. The first issue to be resolved in this dispute concerns whether the Division has properly determined that petitioners are entitled to receive interest on the 1982 overpayment of \$16,093.00 only for the period April 15, 1983 to February 4, 1986. As relevant to this proceeding, Tax Law § 688, entitled “Interest on overpayment,” provides that “(a) interest shall be allowed and paid . . . upon any overpayment in respect of the tax imposed by this article: . . . (2) from the date of the overpayment to a date (to be determined by the commissioner) preceding the date of a refund check by not more than thirty days. . . .” Tax Law § 688 (former [f]) further provides that “For provisions terminating interest after failure to file notice of federal change under section six hundred fifty-nine, see subsection (c) of section six hundred eighty-seven.”

B. When a taxpayer’s Federal income tax return is changed or corrected by the IRS, Tax Law § 659 requires said taxpayer to report these changes to the Division within 90 days of the date the Federal changes became final. Tax Law § 687, captioned “Limitations on credit or refund,” contains, *inter alia*, various provisions which set forth the time period within which a claim for credit or refund must be filed. As pertinent to this proceeding, Tax Law § 687(c) provides that a claim for credit or refund of an overpayment based on the result of IRS changes,

which changes were required to be reported to the Division pursuant to Tax Law § 659, must be filed within two years of the date that the notice reporting the changes was required to be filed. In other words, a taxpayer, when filing a claim for credit or refund based on Federal changes, has 2 years and 90 days from the date that the Federal changes became final to file the claim with the Division. In the instant matter, the Federal changes were finalized on November 4, 1985 and petitioners reported these changes to the Division on March 5, 1986. Thus, it is clear that petitioners did not report the Federal changes to the Division within the 90-day period as required by Tax Law § 659; however, they did file their claim for credit or refund within the 2-year and 90-day period as required by Tax Law former § 687(c). It must also be noted that for the 1982 tax year the claim for credit or refund filed on March 5, 1986 was timely filed within the general three-year statute of limitations provided for in Tax Law § 687(a).

C. The Division claims that it properly limited the amount of interest it was required to pay petitioners on the 1982 overpayment based on Tax Law former § 687(c) which states that “[i]f the report or amended return required by section six hundred fifty-nine is not filed within the ninety day period therein specified, interest on any resulting refund or credit shall cease to accrue after such ninetieth day.” Since it is undisputed that the report or amended return for the 1982 tax year was not filed within 90 days of the date the Federal changes were finalized, the Division maintains that petitioners were entitled to receive interest on the 1982 overpayment only for the period April 15, 1983 (the date the 1982 was filed) to February 4, 1986 (a date which is 90 days from the date the Federal changes for 1982 became final).

D. Petitioners, on the other hand, point to the last sentence of Tax Law former § 687(c) which provides that “[t]his subsection shall not affect the time within which or the amount for which a claim for credit or refund may be filed apart from this subsection.” Petitioners assert

that Tax Law § 687(a) provides for a general statute of limitations for credit or refund, i.e., three years from the time the return was filed or two years from the time the tax was paid, and the remainder of Tax Law § 687 sets forth various provisions extending the period provided for in Tax Law § 687(a). In their closing brief petitioners state that:

It is obvious that the provisions of N.Y. Tax Law § 687(c) were intended to provide relief to a taxpayer if, and only if, the general period of limitations under N. Y. Tax Law § 687(a) precluded his obtaining a refund by the time that the settlement with the Internal Revenue Service became final, and none of the other extending provisions was available to preserve the refund. It was for this reason that the last sentence of N.Y. Tax Law § 687(c) was included. Essentially, N.Y. Tax Law § 687(c) provides that, if you need to extend the period of limitations established under N.Y. Tax Law § 687(a) because the time frame of a federal audit caused a taxpayer to “miss” the permitted refund filing deadline of N. Y. Tax Law § 687(a), you can still file for a refund if you file the report required under N.Y. Tax Law § 659 within two years and ninety days after the date the settlement became final. Any other construction would render the last sentence of N.Y. Tax Law § 687(c) meaningless.

Petitioners claim that the legislative history concerning Tax Law former § 687(c) supports that said section was enacted to provide relief to a taxpayer and not to limit their rights and that interest is to be eliminated only for those taxpayers who seek the benefit of the extended period of limitations for refund under Tax Law former § 687(c), which refund would otherwise be barred by Tax Law § 687(a), but who failed to comply with the statutory requirements for a timely filed notice of Federal changes.

E. Resolution of the first issue presented herein essentially involves determining what the Legislature intended in situations where Federal changes were finalized before the general three-year statute of limitations expired, thus creating a situation where, such as here, the claim for refund is timely filed under Tax Law § 687(a), but not timely filed within 90 days of the Federal changes as required by Tax Law § 659. Did the Legislature intend to create a completely separate class of taxpayers with respect to Federal changes thus supporting the Division’s

position that Tax Law former § 687(c) is the exclusive provision for computing interest with respect to overpayments generating from Federal changes? If so, why then did the Legislature include the last sentence of Tax Law former § 687(c) which specifically states that “[t]his subsection shall not affect the time within which or the amount for which a claim for credit or refund may be filed apart from this subsection”? In my view, I believe that the Legislature intended that a taxpayer in the unusual circumstances of this case is allowed to receive interest on the overpayment from the date the overpayment occurred to the date the refund is issued. As support for this proposition I look to Tax Law § 688(a)(4) which was added by the Laws of 1989 (ch 61). This section, effective for tax years beginning on or after January 1, 1989, provides that if an item of income, gain, loss or deduction is changed from one tax year to another, thus producing a tax due in one year and a refund in the other year, the provisions of Tax Law § 688(a)(3) limiting interest is not to be applied “to the extent that the limitation in such paragraph on the right to interest would result in a taxpayer not being allowed interest for a length of time with respect to an overpayment while being required to pay interest on an equivalent amount of the related underpayment.” That is exactly the situation presented here. The Federal audit changes at issue herein involved the proper reporting of certain tax straddle transactions and the final result of the IRS audit of said transactions was to increase taxable income for 1979, which produced a tax due, while increasing the net operating loss allowed to be carried forward from 1981 to 1982, which produced the overpayment. The Division has collected interest from petitioners on the 1979 deficiency for a period in excess of 13 years, from April 15, 1980 to the date the tax was paid on December 30, 1993; yet it wishes to limit the amount of interest it is required to pay on the related overpayment under Tax Law former § 687(c) to a period of

slightly less than three years, from April 15, 1983 to February 4, 1986. I do not believe that the Legislature ever intended such a result.

F. Although the conclusion on the first issue renders moot issues II and III, I will nonetheless briefly address these issues. With respect to the second issue raised by petitioners, I find that if they were not entitled to the relief granted in Conclusion of Law “E” that they would be entitled to a refund of a portion of the interest paid on the 1979 deficiency. In the prior proceeding it was concluded that petitioners filed with the Division forms IT-115 reporting the Federal changes for all four years on March 5, 1986. At this point in time petitioners had advised the Division that they owed \$15,649.00, later determined to be \$16,588.00, for 1979 and had an overpayment of \$16,093.00 for 1982. Tax Law § 686(a) provides that the Division may credit an overpayment due a taxpayer against, *inter alia*, any liability owed by the taxpayer under Article 22 of the Tax Law. The Division concedes in its brief that “had the Division actually been in receipt of the reports of federal audit changes it probably would have credited the 1982 overpayments against the 1979 deficiency.” If this had occurred there would have been no dispute concerning interest since the interest due for the 1979 tax year would have been significantly reduced by the application of the 1982 overpayment against the 1979 deficiency effective April 15, 1983.

The Division notes that the prior determination concluded that petitioners had established that they mailed forms IT-115 reporting the Federal changes on March 5, 1986; that the Division had failed to meet its burden of proving nonreceipt and that the claim for credit or refund for the 1982 tax year was therefore timely filed. The Division maintains that the prior determination did not address the issue of actual receipt of the notices of Federal changes by the Division and that this “is not a case where the Division was in actual receipt of the petitioners’ reports and chose

to sit on its hands.” Unfortunately for the Division there is no evidence in the prior record to support that it did not receive the reports and, as noted in the prior determination, its burden in this regard was light. A simple affidavit from the Commissioner of Taxation pursuant to Tax Law § 691(d) certifying that the reports had not been filed in all likelihood would have produced a markedly different result in the prior proceeding. Notwithstanding this light burden, the Division in the prior proceeding failed to adduce any evidence concerning the nonreceipt of the forms IT-115. It is not known whether the Division’s failure to submit evidence regarding its nonreceipt of the forms IT-115 was merely an oversight or part of its litigation strategy. Accordingly, the Division’s statement that this “is not a case where the Division was in actual receipt of the petitioners’ reports and chose to sit on its hands” cannot be accepted since this may have been exactly what happened.

In summary, petitioners adduced sufficient credible evidence to prove they timely prepared and mailed of the forms IT-115 on March 5, 1986 and the Division presented absolutely no evidence to refute petitioners’ evidence or establish that it did not receive said forms. Accordingly, it can only be concluded that the Division received the forms IT-115 on or about March 5, 1986 and that for interest computation purposes it should have applied the 1982 overpayment of \$16,093.00 against the 1979 tax due of \$16,588.00 in accordance with Tax Law § 686(a).

G. Petitioners’ final argument is based on the principles of fairness and equity and that refunding the interest to them is a means of avoiding the unjust enrichment of the Division at their expense. Tax Law § 2012 allows a presiding officer to hear and receive the evidence and testimony necessary for a just and equitable determination and in my opinion granting petitioners the relief they seek produces a just and equitable determination.

H. The petition of Jack Friedman and Esther Friedman is granted and the Division is hereby directed to compute and refund to petitioners the interest they are entitled to receive on the \$16,093.00 overpayment from February 5, 1986 to May 10, 2000 (this amount hereinafter referred to as “the unpaid interest”). Petitioners are also entitled, pursuant to Tax Law § 688(a)(2), to receive additional interest on the amount of the unpaid interest, which additional interest is to be computed from May 11, 2000 to a date preceding the date of the refund check by not more than 30 days.

DATED: Troy, New York
March 14, 2002

/s/ James Hoefer
PRESIDING OFFICER